BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

As of the date of preparation of this brief, this case has not been officially reported. The majority opinion of the Court of Claims will be found on pages 72 to 80 of the Record, and the dissenting opinion on pages 81 to 82. The Special Findings of Fact will be found in the record on pages 61 to 71, and the Conclusion of Law on page 71.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the Act of February 13, 1925, 43 Stat. 939 Chap. 229, Sec. 3 as amended by the Act of May 22, 1939, 53 Stat. 752, Chap. 140 (U. S. C. A. Title 28, Sec. 288 and Supp. See Appendix, page 22).

2. Moreover, with respect to the plaintiffs' claim for damages caused by the Government's failure to supply properly qualified labor, the Act of July 23, 1937 (50 Stat. 533, Chap. 520, U. S. C. A. Title 28, Sec. 250b in Supp.) specifically provides for review of the judgment of the Court of Claims "in the same manner as is provided by law in other cases in such court" (See Appendix, pages 22-23).

3. The nature of the case, the rulings of the Court of Claims, and the reason why a writ of certiorari should be granted are set forth in the foregoing petition.

4. As shown in such petition, with respect to one of plaintiffs' main items of claim, *i. e.*, for damages resulting from breach of contract due to failure of the pre-existing dam, the reasons for review on writ of certiorari are among those set forth in Paragraph 5 of Rule 38 of the Rules of your

Honorable Court as construed in conjunction with Paragraph 3 of Rule 41 thereof, to wit:

(1) The Court of Claims has rendered a decision concerning a contractor's right to sue the Government for unliquidated damages in a way not in accord with the applicable decisions of your Honorable Court or with its own earlier decisions;

(2) The Court of Claims has decided a question concerning a contractor's right to sue the Government for unliquidated damages, which is a question of general importance, particularly at this time.

5. As shown in such petition, with respect to the plaintiffs' other main item of claim, *i. e.*, for damages incurred by reason of the Government's failure to supply properly qualified labor, the reasons for review on writ of certiorari are among those set forth in Paragraph 5 of Rule 38 of the Rules of your Honorable Court as construed in conjunction with Paragraph 3 of Rule 41 thereof, to wit:

(1) The Court of Claims has decided an important question of Federal law which has not been, but should be, settled by your Honorable Court;

(2) The Court of Claims has decided a claim of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by your Honorable Court.

Statement of the Case.

Your petitioners, the plaintiffs below, entered into a contract with the United States for the construction of a dam across the Ohio River at Emsworth, Pa., such dam to be constructed on the upstream side of, and parallel to and abutting, an old dam (Finding 2, R. 62). Under the con-

tract the new dam was to be built in four successive coffer dams, the first of which had been constructed previously by another contractor but had not been dewatered. The old dam was to act as the lower arm of each such coffer dam (Finding 3, R. 62-63), and was intended to contribute to the new dam its share of the horizontal resistance to the thrust of the water (See Finding 13, R. 69-70; Plffs'. Ex. D. R. 51).

When plaintiffs attempted to dewater the first coffer dam, it was discovered that there were large holes in the old dam, making it unfit for use as planned (Finding 4, R. 63). Change Order No. 1 was then issued by the Government, requiring plaintiffs to remedy the situation by building a steel sheet pile cut-off wall parallel with the old dam and one foot upstream from it, and filling in the space between with concrete (Finding 4, R. 63).

Plaintiffs accepted this Change Order and performed the work required thereby, but in doing so were obliged to hold idle at the job site the labor and equipment which had been assembled to perform the work under the contract, causing them a loss which according to the figures adopted by the Court of Claims is $57,675.06 (Finding 8, R. 66).

One of the main items here involved is plaintiffs' claim for damages resulting from the failure of the old dam, as above described. The Court of Claims has refused this claim, as well as two smaller claims relating to the height of the piers and the number of piles constructed, on the ground that the acceptance of the change order by the plaintiffs constituted a waiver of plaintiffs' claim for unliquidated damages arising from the Government's breach of contract (R. 72, 75).

The facts concerning the other main item here involved can be stated very briefly.

Under Article 19(a) of the contract, the plaintiffs were required to take their labor from the United States Em-

ployment Service (R. 98; Finding 14, R. 70). The Act of Congress of July 23, 1937 (the relevant provisions of which are quoted in the foregoing petition at page 4) provides that in such case if the Government fails to supply properly qualified labor, the contractor may recover the resulting excess costs. Despite positive uncontradicted testimony that the labor furnished was not properly qualified, the Court of Claims has refused recovery on this item, Judge Green dissenting.

Specification of Errors to be Urged.

1. With respect to the failure of the old dam, the Court of Claims erred in holding that the plaintiffs' acceptance of a change order is a good defense to their claim for unliquidated damages for breach of contract.

2. With respect to the failure of the old dam, the Court of Claims erred in holding that payment for work performed under a change order included payment for unliquidated damages suffered as a result of a prior breach of contract.

3. With respect to the failure of the old dam, the Court of Claims erred in basing its opinion in part on the decisions of Government executive officers denying plaintiffs' claims for unliquidated damages.

4. The Court of Claims erred in basing its findings as to sums due plaintiffs on *ex parte* findings of Government executive officers.

5. With respect to the failure of the old dam, the Court of Claims erred in refusing to enter judgment for the plaintiffs for damages for breach of contract.

6. The Court of Claims (in the majority opinion) erred in its construction of the Act of Congress of July 23, 1937.

7. The Court of Claims (in the majority opinion) erred in considering the report of the Committee of the House and the report of the War Department with respect to the said Act of July 23, 1937 prior to enactment.

8. The Court of Claims (in the majority opinion) erred in failing to construe the words "qualified labor", as used in said Act, according to the commonly understood meaning of such words.

9. The Court of Claims erred in failing to make a finding as to whether or not the labor was qualified.

10. The Court of Claims erred in failing to make a finding that the labor furnished was unqualified to such an extent as to delay the plaintiffs a specified number of days in the performance of the contract work.

11. The Court of Claims erred in refusing to enter judgment for the plaintiffs for the amount of plaintiffs' excess costs incurred by reason of the Government having failed to supply the plaintiffs with properly qualified labor.

ARGUMENT.

The plaintiffs, in their petition for writ of certiorari, have requested the court to review three questions, each of which will now be discussed very briefly.

1. When the Government breaches a contract and in order to cure the breach gives the contractor a change order for work required to cure the breach, such change order failing to include any provision for the payment of idle labor and equipment forced to stand by while the breach was being cured, may such contractor recover the damages resulting from the idle labor and equipment, or can the Government refuse payment on the ground that in the contract it, the Government, reserved the right to modify the con-

tract and that the change order issued to cure the breach was merely a modification of the contract?

It is respectfully submitted that the Court of Claims' answer to this question is in conflict with the decisions of your Honorable Court and the prior decisions of the Court of Claims allowing recovery for breach of contract in such cases, particularly the decisions in the cases of *U. S.* v. *Spearin,* 248 U. S. 133 (1918); *Karno-Smith* v. *U. S.,* 84 Ct. Cls. 110 (1936); *Plato* v. *U. S.,* 86 Ct. Cls. 665 (1938), and *Gillen* v. *U. S.,* 88 Ct. Cls. 347 (1939).

In its decision denying recovery to the plaintiffs, the Court of Claims relied principally upon certain portions of Change Order No. 1 (Ex. "C", R. 49-51). The portions of the Order relied upon by the Court of Claims should not properly be considered by themselves. So that their proper meaning may be shown clearly, the entire Change Order No. 1 is quoted herein, as follows:

> "It has been determined that in view of the impossibility of unwatering the cofferdams so that work may proceed therein, due to serious unforeseeable leakage through the foundations of the existing dam which forms the down-stream arms of the cofferdams, it is necessary and in the best interest of the United States to modify said contract in certain particulars as follows:
>
> "The contractor shall furnish all plant, labor, and materials and perform all work required to construct a steel sheet pile cut-off wall along the upstream face of the existing dam and under Pier No. 5, connecting the cut-off wall provided in the original contract, and the cut-off wall along the upstream face of the existing dam, as shown on drawing number O-LEM-65/1, U. S. Engineer Office, Pittsburgh, Pennsylvania, January 24, 1936.
>
> "**As a result of the above changes, the location of the new dam shall be shifted one foot upstream from the location shown on the original plans.**

"Payment for this work shall be made as follows:

"For furnishing and placing steel sheet piling (M-110)	$1.25 per sq. ft.
For furnishing and placing tie rods, bolts, clevises, etc.	0.20 per lb.
For removing and placing tie rods, bolts, clevises, etc.	0.03 per lb.
For placing and removing structural steel	0.03 per lb.
For concrete removal, per anchor	5.00 each
For wood block spacers	0.25 each
For furnishing and placing concrete under water (as provided in paragraph 5-13(d) of the specifications)	9.65 per cu. yd.

"For all other items affected by this change order, the unit prices set forth in the contract.

"It is understood and agreed that on account of the foregoing modification of said contract, the contract time shall be increased 10 days, plus one additional day for each 25 linear feet of cut-off wall, measured along the center line of the existing dam.

"It is further understood and agreed that all other items and conditions of said contract shall be and remain the same. The estimated cost of the proposed change is $110,084.66.

"This change order, being in excess of $500 in amount, does not become effective until approved by the Chief of Engineers.

"Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereon in the space provided below.

Yours very truly,

W. D. STYER,
Major, Corps of Engineers,
District Engineer."

It is respectfully submitted that if the Government can relieve itself from responsibility for damages caused by a breach of the contract, by giving the contractor a change

order to remedy the breach, and pay merely for the work done under the change order, then contractors dealing with the Government will be completely at the mercy of the Government and will lose the benefit of their right to hold the Government responsible in the same manner as though it were suable, as an individual is suable.

The Court of Claims took the following sentence from the Change Order: "It is further understood and agreed that all other items and conditions of the contract shall be and remain the same", and construed this sentence as though it had read "The contractor hereby waives all claims for damages resulting from a breach of warranty in respect to the existing dam". It is submitted that there is no possible justification for any such construction.

The Court of Claims also placed considerable emphasis on the fact that the change order referred to a "modification" of the original contract. Apparently it felt that the execution of the change order constituted a novation, or an accord and satisfaction, eliminating from future consideration any claims arising from a breach of the original contract. Such was not, and could not have been, the case. The Government contracting officer had no authority to entertain or settle claims for unliquidated damages, a principle firmly established by a long line of cases. (*Clyde* v. *U. S.*, 13 Wall. 35, 39; *Wm. Cramp & Sons* vs. *U. S.*, 216 U. S. 494 (1910).) Since the Government could not have been bound by the official making the change order, so far as unliquidated damages are concerned, it is submitted that the plaintiffs' right to such damages could not have been affected by the change order.

It must be remembered that if the Government had desired the change order to eliminate any possible claims for damages resulting from the failure of the old dam, a statement to such effect could easily have been inserted in the

change order. It is well settled that the rule that a contract is to be construed most strongly against the party preparing it, applies to the Government in a case like this (*U. S.* v. *Newport News Shipbuilding & D. D. Co.*, 178 Fed. 194, C. C. of App. 4th Cir. (1910); *Scully* v. *U. S.*, 197 Fed. 327 D. C. Nev. (1912); *Ohio Bank etc.* vs. *Willys Corp.*, 16 Fed. (2d) 859, C. C. of App. 3rd Cir. (1926)).

When plaintiffs' accepted the "modification of the contract", they were agreeing to do the work necessary to cure the breach, and they were agreeing to accept certain prices for such work. The change order made no provision for unliquidated damages. True, it "provided for the payment of the entire increase in costs *due to the changes made*", as stated in the opinion of the Court of Claims (R. 75); but it did not provide for the payment of the increase in costs *due to the delays incurred as a result of the Government's breach of contract.*

In *Nourse* v. *U. S.*, 25 Ct. Cls. 7 (1889), the plaintiffs had been engaged in performing Government contracts for the remodeling of certain guns, when they were instructed by the proper Government official to suspend work. Quoting from the opinion of the court (p. 19):

> "* * * about five weeks after notice of suspension, and in consequence of it, the parties entered into a new arrangement, which they called 'supplemental articles of agreement, amendatory of the contracts'.
>
> "In this amendatory contract the defendants agree to pay the claimants for the work already done $42,-029, and to allow them to complete the work if they (the defendants) should eventually desire to have it done by anybody. The claimants agree to accept this sum in full satisfaction of all work and profits up to that date, and to complete their several contracts 'when so permitted' by the defendants on the original terms."

Five years went by and the Government had not instructed the plaintiffs to complete the work. Plaintiffs then

filed their claim for profits on the unexecuted portion of the contracts. The Court of Claims held that the long delay on the part of the Government was in effect an abandonment of the contracts and that the "amendatory" agreement did not bar the plaintiffs from suing for damages on the original contracts. Similarly in the case at bar, the change order drawn up by the Government official should be construed in the way most favorable to the plaintiffs, and should not be considered a bar to their recovery of damages on the original contract.

2. Have executive officers of the Government authority to entertain and settle claims for unliquidated damages; and is a contractor barred from recovering unliquidated damages by the refusal of an executive officer of the Government to allow a claim for such damages?

All through the opinion of the Court of Claims there are references to the fact that the contractors made claim to the contracting officer or the engineer in charge and that the engineers in charge denied the claim, with the apparent assumption that the failure on the part of the contractor to appeal from the decision of the engineers was fatal to the claim.

As stated above, it is well settled that executive officers of the Government are not authorized to entertain and settle claims for unliquidated damages. In *Plato* v. *U. S.* (*supra*), provisions of the contract and specifications relating to disputes and claims and protests, substantially identical with the provisions of the contract here in suit, were considered by the court, which said (p. 677-678):

> "However, it has nowhere been held by this Court, or the Supreme Court, that claims for damages resulting to a contractor because of delays on the part of the Government are of the character of disputes contemplated in Article 15 of the contract which are to

be submitted to and decided by the contracting officer, or his duly authorized representative.

"This Court has recently decided that precise question in Phoenix Bridge Co. *v.* United States, No. 42084, 85 C. Cls. 603. Article 15 of the contract in that case relating to disputes was quite similar to Article 15 of the instant case. The Government in that case contended that as a prerequisite to suit, a claim for damages arising out of delay on the part of the Government had to be presented to the contracting officer for decision. The court rejected this contention: 'Counsel for defendant appear to contend that the court may not award plaintiff damages for delay caused by the defendant for the reason that plaintiff did not submit its claims for unliquidated damages to the contracting officer. But there was no provision in the contract requiring that this should be done as a condition to the plaintiff's right to sue, or as a condition to the exercise of jurisdiction over the claims by the court. Art. 15 of the contract related to disputes but makes no reference to the matter of submission of claims for damages for delays caused by the defendant. Art. 9 of the contract provided that plaintiff should notify the contracting officer of the delays and that such officer should ascertain the facts and extent of the delay but does not provide for the submission of damage claims for such delays. Paragraph 20 of the specifications related to the filing of protests. Art. 3 of the contract related to changes; Art. 4 concerned changed conditions, and Art. 5 related to extra work. None of these provisions required plaintiff to submit to the department its claims for the amount of damages for delays. In Clyde *v.* United States, 13 Wall. 35, 39, the court held that to require claimants to first submit their claims to the department was "establishing a jurisdictional requirement which Congress alone had the power to establish." ' "

If the decision of the Court of Claims was based on the action of the executive officer and the failure to appeal from

his decision, it is contrary to the rule previously laid down and followed by your Honorable Court and the Court of Claims itself. However, it may very well be that the references to executive rulings were in the opinion merely as makeweight and not as the basis of decision, but even in such event as makeweight they were utterly valueless to sustain the decision.

3. Under the provisions of the Act of Congress of July 23, 1937, providing that contractors may recover damages incurred by reason of the Government having failed to supply qualified labor under the labor clauses of Government contracts, is a contractor barred from recovering losses suffered as a result of the Government's failure to supply him with qualified labor because he should have anticipated that the quality of the labor would be poor and because he received the same type of poor labor that was supplied by the Government agency to other contractors on other contracts?

The Act of July 23, 1937 (copy of which is attached hereto in the Appendix, at pages 22-23) was passed by Congress for the relief of contractors holding contracts for flood-control work in the Mississippi Valley who were compelled to take labor furnished by the United States Employment Office under the terms of their contracts. The Court of Claims, construing this Act for the first time, held by a divided court that unless the labor furnished to the contractor was worse than he could reasonably have anticipated, the Act could afford him no relief. The dissenting opinion of the Court of Claims stated that such a construction rendered the Act meaningless and useless, that a contractor was entitled to recover in the event that the labor furnished was not "qualified", *i. e.*, competent, fit or capable, and that the word "qualified" needed no explanation or construction.

In *Young-Fehlhaber Pile Co.* v. *U. S.*, 90 Ct. Cls. 4 (1939), the plaintiff performed a contract for re-enforcing a pier, such contract containing a provision like the one here in question, providing that the labor should be furnished by the United States Employment Service. After the contract time had been extended several times, the work was finally completed and plaintiff claimed for damages suffered as a result of the Government's failure to provide labor in accordance with the contract provisions. The situation was evidently identical with the present case. The court found (Finding 5, p. 6):

> "Plaintiff repeatedly requested the employment service to send men to the work but sufficient men were not supplied and did not report to plaintiff. Such men as did report were in many cases not qualified to perform the type of work for which they had been requested and plaintiff was forced to train such men on the job as best it could."

As the pier which the Young-Fehlhaber Company reenforced was not on the Mississippi River or its tributaries, the Act of July 23, 1937, did not apply. The court held that the contract "carried an implied agreement to furnish the men necessary to carry on the work" (p. 11), having first stated:

> "But the United States Employment Service was not able to furnish sufficient qualified men to carry on the work and the necessary workmen could not be obtained in accordance with the terms of the contract. Part of this was caused by the dangerous nature of the work and part by other causes."

Thus, the Young-Fehlhaber Company was allowed to recover damages for the delay caused by the Government's failure to supply the necessary qualified workmen under the provisions of the contract. How much more so should

the plaintiffs in the present case be entitled to recover damages, in view of the fact that Congress, in the Act of July 23, 1937, has clearly expressed its intent that recovery in such cases should be allowed.

There are numerous cases pending in the Court of Claims under this Act. In view of the fact that the Court of Claims was not unanimous in construing the Act, your petitioners believe that an authoritative ruling should be made as to the meaning of the Act.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for.

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January 3, 1941.